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In the Supreme Court of the United States

October Term, 1969

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v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–14) is not yet officially reported. The Board's decision and order (Pet. App. 15–23) are reported at 170 NLRB No. 92.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1969 (Pet. 2). The petition for a writ of certiorari was filed on July 25, 1969. The juridiction of this Court is invoked under 28 U.S.C. 1254(1).

361—024—69——1

QUESTION PRESENTED

Whether the Board properly found that two purchasers of automobile dealerships, which had previously been operated directly by General Motors Corporation, were not "successor employers" to General Motors and therefore were not required to assume its bargaining obligations after commencing their operations.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at p. 3 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT.

Prior to May 1965, the Cadillac Division of General Motors Corporation ("GM"), which manufactures Cadillac automobiles, parts and accessories, operated two retail branches in Los Angeles for the sale and servicing of its cars and accessories—one at West Seventh Street (Bixel), and the other at Wilshire Boulevard (Wilshire). In August 1957, petitioner International Association of Machinists, District Lodge 94, AFL–CIO ("Machinists Union") was certified as the bargaining representative for a single unit of the service employees, including painters, at both the Bixel and Wilshire outlets. A contract was negotiated covering both locations. In November 1958, petitioner Automotive, Marine, Production Finishers, Equipment Maintenance & Public Service Painters, Local 1798, Brotherhood of Painters, Decorators &

Paperhangers of America, AFL–CIO ("Painters Union") was certified as the bargaining representative for a single unit of auto body painters at both locations. Thereafter, the Painters and Machinists Unions bargained jointly with GM for a single contract covering both units. Such a contract was executed on December 1, 1964, and was to remain in effect until December 1, 1967 (Pet. App. 17).[1]

Early in 1965,[2] GM decided to withdraw from the retail sale and service of Cadillac cars in Los Angeles and to transfer such operations to independent franchised dealers; it informed the Machinists and Painters Unions of its intention and subsequently bargained with them on this matter (Pet. App. 18, 21). On April 28, the parties reached a supplemental agreement to cushion the effects of the closing on the GM employees (Pet. App. 21–22). On May 10, GM wrote the Unions that, on June 1, Thomas Cadillac, Inc., would take over the Bixel location, and Lou Ehlers Cadillac would take over the Wilshire location (Pet. App. 18). About a week later, the Unions requested Thomas and Ehlers to meet with them to

[1] The agreement provided for common wages, fringe benefits, and grievance procedures at both locations. Common seniority lists were maintained by occupation, and there was no loss of seniority in transfers between occupations under certain circumstances. Seniority was applicable to layoff procedures at both locations, and an employee continued to accure seniority while employed in any GM plant on national defense work. Holiday, vacation, and paid absence eligibility computations were based on employment in any GM plant. The contract also included GM's National Pension Plan, Insurance Program, and Income Security Plan (Pet. App. 17–18, 22–23).

[2] All dates hereafter are in 1965.

"clarify the rights of the employees" of GM (*ibid.*). Ehlers informed the Unions that the request was premature (Pet. App. 18, 32), while Thomas did not respond (Pet. App. 32). The Unions' request to arbitrate the issue under the GM contract was also declined (Pet. App. 31–32).

On May 28, GM discharged all employees at its Bixel and Wilshire locations. Approximately 117 employees had been in the contract unit—75 at Bixel and 42 at Wilshire. All were union members, except for 2 mechanics and 1 painter at Bixel and 1 mechanic at Wilshire (Pet. App. 18).

On June 1, Thomas and Ehlers commenced operations as independent, competing franchised dealers. In staffing their businesses, both employers considered former GM employees, as well as others; all persons interested were required to submit applications for employment, and employees were hired solely on the basis of ability. Of the 63 service department employees hired by Thomas, only 16 were former GM employees. Its service department supervisory staff of 7 included only 3 former GM service department supervisors. Of the 35 service department employees hired by Ehlers, only 11 were former GM employees. Ehlers' management consisted of Lou Ehlers as general manager, a business manager and general sales manager who had been with Ehlers' prior dealership, and the former GM-Wilshire manager who became Ehlers' new car sales manager. The manager and foreman of Ehlers' service department were not the same individuals who had held those positions for GM (Pet. App. 18–19).

B. THE DECISIONS BELOW

Based on charges filed by the Unions, the General Counsel of the Board issued a complaint alleging that Thomas and Ehlers were the successors to GM and that they therefore violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Unions (J.A. 340–357).[3] The Board concluded, however, that "Thomas and Ehlers did not take over or succeed to GM's bargaining unit" (Pet. App. 19), and accordingly dismissed the complaint. The Board noted that "neither [Ehlers nor Thomas] employed a significant number of service employees who had worked for GM, and the supervisory hierarchy bears little resemblance to that formerly existing under GM. Moreover, * * * both Thomas and Ehlers selected their employees * * * on the basis of skill and ability, and were in no way influenced by union membership of the job applicant" (*ibid.*).

The court of appeals upheld the Board's dismissal of the complaint. The court stated, *inter alia*: "Even a cursory comparison of the differences in the enterprises operated by General Motors and those operated by Thomas and Ehlers shows a marked lack of identity. The outlets operated by Thomas and Ehlers were in direct competition for sales and service not only with each other but all other dealers, * * * whereas under General Motors ownership there was not aggressive advertising and sales promotion vis-a-vis other General Motors dealers. * * * [M]anagement,

[3] "J.A." refers to the appendix to the briefs in the court below, a copy of which has been filed with the Clerk.

accounting, and advertising were centrally controlled under the factory arrangement but were totally separate and independent after the new franchise dealers took over" (Pet. App. 5). The court concluded: "Our review satisfies us that the record contains substantial evidence which supports the Board's finding that Thomas and Ehlers were not successors of the General Motors' dealerships, thereby neutralizing the contention that the prior existence of a valid certification created a presumption of continued majority status which obligated Thomas and Ehlers to bargain with the Unions" (Pet. App. 7).[4]

ARGUMENT

Petitioners do not seriously contest (Pet. 22) the Board's finding, upheld by the court below, that Thomas and Ehlers were not "successor employers" to GM.[5] Rather, petitioners seek to present (Pet.

[4] In a concurring opinion, Judge Leventhal suggested that, although a purchaser ultimately may be found not to be a "full successorship," "[w]here there is a continuity of business purpose there may be a preliminary and partial bargaining relationship during the transition period" which would obligate the purchaser to discuss the retention of existing unit employees with their union representative (Pet. App. 11–12). Judge Leventhal concluded, however, that this narrower issue was not presented in the instant case (Pet. App. 13).

[5] Where a transfer of assets and employees from one employer to another leaves intact the identity of the employing enterprise, the former's duty to recognize and bargain with an incumbent union devolves upon the latter as a "successor employer." *Makela Welding, Inc.* v. *National Labor Relations Board*, 387 F. 2d 40, 46 (C.A. 6); *National Labor Relations Board* v. *Tempest Shirt Mfg. Co.*, 285 F. 2d 1, 4 (C.A. 5); *Overnite Transportation Co.* v. *National Labor Relations Board*, 372 F. 2d 765 (C.A. 4), certiorari denied, 389 U.S.

18–20) the issue suggested in Judge Leventhal's concurring opinion (n. 4, *supra*), *i.e.*, even if Thomas and Ehlers were not true successors, there should be imposed upon them *"the limited duty of responding affirmatively to the Union's request to subject the important issues of retention of employment to the collective bargaining process"* (Pet. 22; emphasis in original). But, as Judge Leventhal correctly pointed out (Pet. App. 13), the complaint did not allege any such limited obligation (see J.A. 349–356). Nor, contrary to petitioners' assertion (Pet. 20–21), was the issue litigated at the Board hearing. Although petitioners requested Ehlers and Thomas to discuss the effect of their acquisitions on the unit employees, the theory on which it was contended that they were required to do so was that they had succeeded to GM's bargaining obligations. There was no discussion of any obligation Thomas and Ehlers might owe to the GM employees independent of successorship.[6] The issue which petitioners seek to raise is, therefore, not presented in this case.

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838. However, where, as here, substantial changes, not for the purpose of avoiding the bargaining obligation, are made in the operation, structure, or work force of the enterprise, altering its former identity, the new employer is not a "successor." Compare *National Labor Relations Board* v. *John Stepp's Friendly Ford, Inc.*, 338 F. 2d 833, 835–836 (C.A. 9), with *K.B. & J. Young's Super Markets, Inc.* v. *National Labor Relations Board*, 377 F. 2d 463, 466 (C.A. 9), certiorari denied, 389 U.S. 841. See *National Labor Relations Board* v. *Alamo White Truck Service, Inc.*, 273 F. 2d 238 (C.A. 5).

[6] Petitioners' reliance (Pet. 19) on *Chemrock Corp.*, 151 NLRB 1074, is misplaced. The Trial Examiner relied on *Chemrock* for the proposition that, assuming successorship is established, the successor employer may not terminate the previous owner's employees and then claim a good faith doubt of

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the union's majority status (see Pet. App. 56). However, the Examiner's finding of successorship was reversed by the Board. *K.B. & J. Young's Super Markets, Inc.* v. *National Labor Relations Board, supra* (Pet. 18–19), is similarly inapposite. There an employer deemed to be a successor attempted to avoid that status by requiring his predecessor to discharge the entire work force prior to acquisition. Here, on the other hand, Thomas and Ehlers hired their work forces on the basis of merit, without any intention of evading a bargaining obligation (Pet. App. 5, 19).

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